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UNION PACIFIC RAILROAD COMPANY

Law Department

1416 DODGE STREET
ROOM 830
OMAHA, NEBRASKA 68179-0001
FAX (402) 271-5610

March 22, 2000

VIA UPS NEXT DAY AIR

Hon. Vernon A. Williams
Secretary
Interstate Commerce Commission
12th & Constitution Avenue, N.W.
Washington, D.C. 20423

Re: Finance Docket No. 32760 (Sub-No. 37), Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company -- Control and Merger -- Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and The Denver and Rio Grande Western Railroad Company
(Arbitration Review)

Dear Mr. Williams:

Enclosed for filing in the above-referenced proceeding are an original and 10 copies of Union Pacific Railroad Company's Reply In Opposition To The Appeal Of An Arbitration Award.

Please acknowledge receipt on the enclosed copy of this letter and return it to me in the stamped, addressed envelope provided for the purpose.

Very truly yours,

Henry N. Carnaby

Henry N. Carnaby
General Attorney

cc: All Parties of Record

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ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760 (Sub.-No. 37)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY
-- CONTROL AND MERGER --
SOUTHERN PACIFIC RAIL CORPORATION,
SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS
SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP. AND THE
DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

(Arbitration Review)

UNION PACIFIC RAILROAD COMPANY'S REPLY IN OPPOSITION TO THE APPEAL OF AN ARBITRATION AWARD

Henry N. Carnaby
General Attorney
Union Pacific Railroad Company
1416 Dodge Street, Room 830
Omaha, Nebraska 68179
(402) 271-6302

UNION PACIFIC RAILROAD COMPANY'S REPLY IN OPPOSITION TO THE APPEAL OF AN ARBITRATION AWARD

I.

INTRODUCTION

The General Chairman for the Union Pacific Railroad - Eastern Region General Committee of Adjustment ("Eastern Region") of the Brotherhood of Locomotive Engineers ("BLE") has petitioned for review of one of the seven cases resolved in the Opinion and Award issued by Arbitrator Eckhard Muessig on February 8, 2000, in an arbitration under the New York Dock conditions.[1] In the petition the Eastern Region challenges only the Opinion and Award in Case No. 7 which dealt with twelve employees who responded to an October 10, 1998 bulletin for bids to enter Engineer Training for positions at Kansas City. The Petitioner claims that these engineers should be given prior rights in Zone 2 of the Kansas City Hub.

The arbitrator determined that the "effective date" for the Kansas City Hub Merger Implementing Agreement was July 2, 1998. The twelve trainmen responded to a notice dated October 10, 1998. They did not actually enter training until several weeks later. Since this was over three and one-half months after the effective date, the trainees were held not to be entitled to prior rights.

Union Pacific opposes the Eastern Region's petition for review. The challenge to the Award in Case No. 7 does not merit further review. The Board has

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[1] It is unclear whether the General Chairman of the Eastern Region is acting solely on behalf of his committee or whether he is also appealing on behalf of any or all of the four other committees who participated in this proceeding or the entire BLE International Union.

long held that review of arbitration awards is limited to "recurring or otherwise significant issues of general importance regarding the interpretation of [the] labor protective conditions." Chicago & N.W. Transp. Co. --Abandonment ("Lace Curtain"), 3 I.C.C. 2d 729, 736 (1987), aff'd sub nom., International Brotherhood of Electrical Workers v. I.C.C., 862 F.2d 330, 335-38 (D.C. Cir. 1988). Review is not available on "issues on causation, the calculation of benefits, or the resolution of factual disputes." CSX Corp. -- Control -- Chessie System, Inc., 4 I.C.C. 2d 641, 649 (1988); See also, Fox Valley & Western Ltd. -- Exemption Acquisition & Operation, 1993 ICC LEXIS 228, *5 (served Nov. 16, 1993); Lace Curtain, 3 I.C.C. 2d at 736. The Board will vacate an award "only when 'there is egregious error, the award fails to draw its essence from [the labor conditions], or the arbitrator exceeds the specific contract limits on his authority." Norfolk & W. Ry. Co. -- Merger, Finance Docket No. 21510 (Sub-No. 5) at 3-4 (served May 25, 1995) (quoting, Lace Curtain at 735); Fox Valley & Western, Infra at *5.

The Petitioner merely cites the Lace Curtain standard in passing with a conclusory statement that the Award fails to meet this standard. It appears that the Petitioner is presenting two issues: (1) whether Arbitrator Muessig committed egregious error in finding that the effective date of the Kansas City Hub Merger Implementing Agreement was July 2, 1998 and (2) whether he committed egregious error in determining that the July 2, 1998 date was the cut-off date for prior rights so that employees who entered training after that date were common employees. As we show below, Arbitrator Muessig did not err, much less egregiously, in determining the

effective date of the Kansas City Hub Merger Implementing Agreement or in finding that the Agreement's effective date operated as the cut-off date for assertion of prior rights.

II.

STATEMENT OF FACTS

Incorporated into Union Pacific's merger application was an Operating Plan which indicated that a "hub and spoke" operating scheme would be implemented for the merged railroad. As a result, negotiations were held with the BLE to reach agreement on the details involved in implementation of the "hub and spoke" operations. One of these details was negotiation of when employees may hold prior rights within a particular zone. In the Kansas City Hub, the agreement reached provided for prior rights to placement on the rosters on the basis of "engineers holding seniority in the territory comprehended by the Agreement on the effective date thereof." (Article II, A) Article II, F, states in part: "engineers in training on the effective date of this Agreement shall also participate in formulation of the roster described above." Both of these sentences use the words "effective date."

Article X is entitled "Effective Date" and states: "This Agreement implements the merger of the Union Pacific and SSW/SPCSL railroad operations in the area covered by Notice dated January 30, 1998. Signed at Denver, CO this 2nd day of July, 1998." Since the Article covering the effective date is clear on the specific date the parties had intended to serve as the "effective date" for the Agreement, only those employees who were in training on July 2, 1998 have any claim to prior rights. The trainees at issue in Case No. 7 responded to a notice dated October 10, 1998.

III.

ARGUMENT

The basic issue raised in this appeal is whether Arbitrator Muessig committed egregious error in finding that the effective date of the Kansas City Hub Merger Implementing Agreement was July 2, 1998. Despite the fact that the Union Pacific supported its position with Article X of the Agreement, Petitioner boldly asserts that "the Carrier ... misrepresented the effective date of the implementation of the Kansas City Hub Merger Implementing Agreement as the date of signature, July 2, 1998, ..." In making this argument, Petitioner is merely repeating the argument it previously made in its submission. The factual issue before the arbitrator was the specific date referenced in Article II, A and Article II, F of the Agreement as the "effective date." Union Pacific argued in each of the seven cases that the "effective date" for each hub agreement was the date they had originally been initialed by the negotiating parties. In the Kansas City Hub Merger Implementing Agreement this position is clearly supported by Article X which is entitled "Effective Date" and reflects a date of July 2, 1998.

The Petitioner's argument is essentially that the term "effective date" should mean the implementation date or what it refers to as the effective date of implementation. Not surprisingly, the arbitrator found this argument unpersuasive in light of the clear and unequivocal language in the Agreement. Although the arbitrator made similar factual findings with regard to the effective dates of the other Hub and Spoke Agreements, it is interesting to note that the Eastern Region takes issue only

with the finding for the Kansas City Hub. Regardless of the merits of the arguments advanced, the Eastern Region is merely presenting a factual dispute which does not merit review under the Lace Curtain standard.

Similarly, the arbitrator did not commit egregious error in determining that the July 2, 1998 date was the cut-off date for prior rights so that employees who entered training after that date would be common employees. Article II, F, states in part: "engineers in training on the effective date of this Agreement shall also participate in formulation of the roster described above." It seems intuitive that if engineers who are in training on the effective date of the Agreement acquire prior rights, engineers who have not entered training by that date would not. Having determined that the effective date of the Kansas City Hub Merger Implementing Agreement was July 2, 1998, there was no error in determining that the trainees who responded to a notice dated October 10, 1998, over three and one-half months after the effective date, could not properly claim prior rights in Zone 2. By that date the agreement had been mailed to all engineers for a ratification vote. To allow these later trainees to become prior righted would be contrary to the proposal voted on.

The remaining arguments advanced by the Eastern Region are irrelevant. The finding that the issue in Case No. 7 is factually similar to Case No. 1 is obviously supported by the record. In both cases the issue was whether trainees who entered training after the effective date of a hub agreement but prior to its implementation could claim prior rights. The Petitioner's suggestion that different parties to the dispute changes the issue merely misapprehends the clear intent of the arbitrator's findings.

The only point of the statement was to show that given the similarities between the facts and issues presented, it was appropriate to apply the same reasoning to resolve the issue. Similarly, the Eastern Region bends the statements made in the July 16, 1999 letter of L. A. Lambert beyond the breaking point. The notice posted on October 10, 1998 is devoid of any reference to acquiring prior rights. In Mr. Lambert's letter he makes it clear that the form of the notice was both necessary and proper at the time and does not support the position taken by the Eastern Region with regard to prior rights. The reference to what the employees subjectively perceived was there, as here, irrelevant to the issue being discussed.

IV.

CONCLUSION

For the foregoing reasons, the Eastern Region's petition to review the Award should be denied.

Respectfully submitted,

By 

Henry N. Carnaby
General Attorney
Union Pacific Railroad Company
1416 Dodge Street, Room 830
Omaha, Nebraska 68179
(402) 271-6302

CERTIFICATE OF SERVICE

I certify that I have this date served a copy of the foregoing document on the party listed below. Service was made by First Class Mail.

Dated at Omaha, Nebraska this 22nd day of March, 2000.

Charles R. Rightnowar
320 Brookes Drive, Suite 115
Hazelwood, MO 63042

Henry N. Carnaby